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No. 94-645

In the Supreme Court of the United States

OCTOBER TERM, 1994

VICTOR POSNER, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether a federal court has the inherent remedial authority in an enforcement action brought by the Securities and Exchange Commission to bar from serving as an officer or director of any public company a defendant who, despite having consented to two prior injunctions against violating the securities laws, has used his position as an officer or director to engage in egregious securities fraud with a high degree of scienter, and to order other ancillary relief.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 16 F.3d 520. The opinion of the district court (Pet. App. 6a-71a) is reported at 837 F. Supp. 587.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1994. A petition for rehearing was denied on May 10, 1994. Pet. App. 72a. On July 29, 1994, Justice Thomas granted an extension of the time in which to file a petition for a writ of certiorari to and including October 7, 1994. The petition for a writ of certiorari was filed on October 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of New York, the court found that petitioner had engaged in a scheme with Michael Milken and Ivan Boesky to defraud and thereby purchase a controlling stock interest in Fischbach Corporation, in violation of the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, 15 U.S.C. 78j(b) and 17 C.F.R. 240.10b-5, as well as other provisions of the federal securities laws.[1] The district court enjoined petitioner from further violations, ordered petitioner to disgorge $3,490,550 he had received from Fischbach, barred petitioner from serving as an officer or director of any public company, and ordered petitioner to place in a voting trust all of the stock he owns in public companies under his control. Pet. App. 58a-71a. The court of appeals affirmed. *Id.* at 1a-5a.

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[1] The court held that petitioner had violated the beneficial ownership reporting requirements of Exchange Act Section 13(d) and Rule 13d-1, 15 U.S.C. 78m(d) and 17 C.F.R. 240.13d-1; the broker-dealer record-keeping requirements of Exchange Act Section 17(a) and Rules 17a-3 and 17a-4, 15 U.S.C. 78q(a) and 17 C.F.R. 240.17a-3, 240.17a-4; and the margin requirements of Exchange Act Section 7(c) and (f) and Federal Reserve Board Regulations X and T, 15 U.S.C. 78g(c) and (f) and 12 C.F.R. 220.1, 224.1. The court found that petitioner illegally failed to amend his Schedule 13D to disclose his beneficial interest in the Fischbach shares purchased by Boesky, and that petitioner aided and abetted Boesky's filing of a false Schedule 13D that failed to disclose Boesky's arrangement with him. Pet. App. 48a-55a. The court found, in addition, that because petitioner's conduct caused false entries to be made in Boesky's broker-dealer records regarding the true ownership of the Fischbach shares, and consequently permitted petitioner to acquire an ownership interest in the shares without any payment, petitioner violated the recordkeeping, margin and credit requirements of the Exchange Act. *Id.* at 56a-57a.

1. Petitioner and his son, Steven Posner, engaged in a scheme with Michael Milken (their investment banker) and Ivan Boesky falsely to make it appear that Boesky had independently purchased more than 10% of Fischbach's outstanding common stock; such an independent purchase would have voided a standstill agreement that barred the Posners from buying a controlling interest in the company. Boesky's purchases had not, in fact, been independent. Rather, he bought the Fischbach stock at the behest of the Posners and Milken, who guaranteed him against loss. As a result of the scheme, the Posners took control of Fischbach and extracted millions of dollars from the company for their personal benefit.[2]

2. Finding that petitioner had violated the securities laws with a "high degree of scienter," and that petitioner had neither demonstrated any recognition of the wrongfulness of his conduct nor offered any assurances that he would not engage in future violations, the court enjoined petitioner from future securities violations. Pet. App. 58a-59a. Moreover, in light of petitioner's demonstrated unwillingness to comply with past injunctions, the court found that "absent further * * * ancillary relief, [petitioner] would continue to abuse [his] positions as officer[] and director[] of public companies and to engage in future violations." *Id.* at 59a. The district court accordingly ordered several forms of ancillary relief.

First, because petitioner's fraud enabled him to insert himself into a position of control at Fischbach and extract millions of dollars from the company at a time when it was failing, the court ordered petitioner to disgorge the $3,490,550 "paid to [him] ostensibly as compensation for [his] services as [an] officer[] and

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[2] Boesky and Milken both pled guilty to criminal charges arising out of the Fischbach scheme. Pet. App. 32a.

director[] of Fischbach." Pet. App. 61a. In the court's view, "[a]ny contention [petitioner] might make that [his] services were of real value to the company is belied by the results reported in Fischbach's public filings." *Ibid.*[3]

Second, acting pursuant to its inherent equitable authority to provide ancillary relief for securities violations, and under the express authority bestowed by the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, § 201, 104 Stat. 935 (the Remedies Act), 15 U.S.C. 78u(d)(2) (Supp. II 1990), the district court barred petitioner from serving as an officer or director of any company that is a reporting company under the Exchange Act. Pet. App. 64a-65a. The court concluded that petitioner's conduct had, within the meaning of Section 201 of the Remedies Act, 104 Stat. 935-936, "demonstrat[ed] [his] substantial unfitness to serve as an officer or director." Pet. App. 64a. The court reiterated that the fraud in this case had been egregious, was committed with a high degree of scienter, and was committed by petitioner in his capacity as an official of a public company. *Id.* at 67a-68a. It considered petitioner's well-documented history of prior securities fraud committed while at the helm of public companies, taking particular note of the fact that petitioner had twice consented to antifraud injunctions in cases in which the Commission had alleged that while at the helm of a public company, petitioner diverted

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[3] Fischbach's annual report filings on Commission Form 10-K reveal that under the Posners' control, Fischbach incurred significant liabilities to other Posner-controlled companies, while its losses steadily mounted and its stock value plummeted. Public File No. 1-7968: Sept. 30, 1985; Sept. 30, 1986; Sept. 30, 1987; Sept. 30, 1988; Sept. 30, 1989; June 6, 1990.

corporate funds for personal use. *Id.* at 38a-47a, 68a.[4] The court also observed that petitioner had repeatedly engaged in serious misconduct in his capacity as an officer and director of public companies. *Id.* at 39a.[5] Lastly, the district court derived support for the

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[4] In 1972, petitioner consented to an injunction against future violations of Exchange Act Sections 10(b) and 13(d) and Rules 10b-5 and 13d-1 thereunder, in a case alleging that he had illegally used assets of Sharon Steel Corporation's pension plan for his own benefit, and that he had failed to file required reports with the Commission. *SEC* v. *Posner*, SEC Lit. Rel. No. 5451 (S.D.N.Y. June 30, 1972). In 1977, petitioner consented to an injunction barring future violations of Exchange Act Section 10(b) and Rule 10b-5, and requiring disgorgement of funds that, the government charged, he had fraudulently diverted from Sharon Steel and its parent company for his personal use. *SEC* v. *Sharon Steel*, SEC Lit. Rel. No. 8119 (D.D.C. Sept. 20, 1977).

[5] The court noted, for example, that in *In re Sharon Steel Corp.*, 86 B.R. 455, 466 (Bankr. W.D. Pa. 1988), aff'd, 871 F.2d 1217 (3d Cir. 1989), the bankruptcy court appointed a trustee to oust the Posners from control on the grounds that they had paid themselves excessive compensation as the company was going bankrupt, caused the company to pay $4.4 million to defend petitioner personally against criminal tax evasion charges, stripped the company of so much cash that trade credit became unavailable, and transferred assets to other companies under their control so that they would be unavailable to creditors. Pet. App. 45a-46a. The court also took note of the shareholders' derivative suit in *Granada Investments, Inc.* v. *DWG Corp.*, No. 1:89CV0641 (N.D. Ohio Apr. 10, 1989), which led to the Posners' ouster from that company. In that case, a court-appointed Special Committee of directors issued a report documenting that the Posners had extracted salaries and bonuses for themselves in excess of DWG's net earnings, charged enormous personal expenses to the corporation, and engaged in non-arms' length dealings with Posner-controlled companies, to DWG's detriment. See Pet. App. 40a-45a. A member of that Special Committee appeared and testified in this case, stating (*id.* at 44a): "[T]his whole situation was just a cash plan to Mr. Posner. The cash was going to him, and the company was just bleeding red."

officer/director bar from petitioner's failure to testify or offer any evidence in opposition to such relief, despite the district court's express invitation for him to testify on that issue. C.A. Tr. 342-343; Pet. App. 47a, 67a.[6] The court permissibly inferred from petitioner's refusal to testify that his testimony would have been unfavorable to him. Pet. App. 67a.

The district court recognized, however, that barring petitioner personally from serving as an officer or director would not prevent him from controlling a company by proxy, and thereby committing further violations through public companies under his control. The court, accordingly, ordered petitioner to place in a voting trust all of the voting securities he owns in public companies under his control (as "control" is defined in 17 C.F.R. 240.12b-2). Pet. App. 68a-71a. Under the terms of the court's order, petitioner retains the unfettered ability to sell or pledge voting securities and to purchase (and place in trust) additional voting securities issued by public companies under his control. *Id.* at 71a. Petitioner thereby retains the economic benefits of owner-

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[6] Petitioner consistently refused to give deposition testimony or produce documents in this case, invoking his Fifth Amendment privilege against self-incrimination. Then, after frustrating for five years the government's attempts at discovery, petitioner announced just before trial his intention to testify at trial. The district court ruled that having denied the government the opportunity to obtain discovery, petitioner would be barred from testifying at trial as to matters on which he had asserted the privilege. Pet. App. 7a, 47a n.6. That ruling was correct, see *ibid.*, and despite petitioner's attempt to paint the court's order as somehow unfair (Pet. 6 & n.1), he does not seek review of that order in this Court. Moreover, as the district court made clear, the preclusion order would not have prevented petitioner from testifying regarding his fitness to serve as an officer or director of public companies. Pet. App. 47a n.6.

ship, but is divested of voting power over any public company that he controls.[7]

3. The court of appeals held that, under the circumstances of this case, the district court acted "within [its] well-established equitable power" in barring petitioner from further service as an officer or director of a public company. Pet. App. 5a. It accordingly did not reach the issue whether the authorization of such a remedy by Congress in the Remedies Act applies retroactively to cases involving conduct that occurred exclusively before that Act's October 1990 effective date. The court found that petitioner's intentional securities violations in this case, coupled with his numerous prior violations and the lack of assurances against future violations, amply supported the district court's conclusion that the officer/director bar was necessary to protect public investors. Pet. App. 4a.

The court also upheld the district court's order requiring petitioner to disgorge the funds he received as an officer and director of Fischbach, on the ground that "[b]ut for [petitioner's] illegal conduct, [he] would not have been in a position to plunder Fischbach." Pet. App. 5a.[8]

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[7] The district court made similar findings of violations and ordered similar equitable relief against Steven Posner, who does not seek review by this Court.

[8] The court of appeals rejected petitioner's evidentiary objections and his contention that the judgment against him was unsupported by the evidence. Pet. App. 3a. Petitioner attempts in his statement of the case (Pet. 3-6) to convey the impression that the district court erred in finding that he was integrally involved in his son's violation of the securities laws in connection with the Fischbach scheme. Petitioner does not seek review of that finding, however, and his misconduct is therefore an established fact for purposes of further review. In any event, as the court of appeals found, the evidence was "more than sufficient to support the

ARGUMENT

This case raises no issue of general or continuing legal importance. If there were ever any doubts respecting the equitable power of a federal court to impose an officer/director bar in circumstances such as those presented here, those doubts were resolved by the Remedies Act, which expressly authorizes the courts to order such relief. Moreover, the court of appeals' holding that the district courts inherently possess that remedial authority is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of this case is therefore unwarranted.

1. The enactment in 1990 of the Remedies Act conclusively resolved any question that might have existed concerning whether the federal courts are empowered, in appropriate circumstances, to bar persons who violate Section 10(b) of the Exchange Act from serving as officers or directors of any publicly held company. Section 201 of the Remedies Act, 104 Stat. 935, codified at Exchange Act Section 21(d)(2), 15 U.S.C. 78u(d)(2) (Supp. II 1990), explicitly authorizes such a bar where a defendant has violated Section 10(b) of the Exchange Act and has engaged in conduct that demonstrates his or her substantial unfitness to serve as an officer or director of a public company. [9]

Petitioner argues (Pet. 18) that the Remedies Act applies only prospectively, and thereby authorizes the imposition of an officer/director bar only for conduct

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district court's finding that [petitioner] violated the securities laws." Pet. App. 3a; see also *id.* at 24a-57a (portion of supplemental findings of fact and conclusions of law relating to district court's findings).

[9] See also Section 101 of the Remedies Act, 104 Stat. 932, codified at Section 20(e) of the Securities Act of 1933, 15 U.S.C. 77t(e) (Supp. II 1990) (authorizing officer/director bar for violations of Section 17(a)(1) of the Securities Act).

occurring after October 15, 1990, the date of its enactment. That argument is incorrect. See notes 22 and 25, *infra*. But even if it were correct, the district court in this case is the only court that has ever addressed the issue, and the issue will be relevant in the future only in those few cases in which an officer/director bar is sought for conduct that occurred exclusively before October 15, 1990. Petitioner's argument therefore raises no issue of general or continuing legal importance warranting further review by this Court. See *Ticor Title Ins. Co.* v. *Brown*, 114 S. Ct. 1359, 1362 (1994); *Dobbs* v. *Zant*, 113 S. Ct. 835, 837 (1993) (Scalia, J., concurring in the judg-ment).

2. Petitioner argues (Pet. 10-16) that the court of appeals "expanded federal judicial power beyond any reasonable limit" in upholding the officer/director bar and other equitable relief. The district court, however, had the inherent authority to order that relief, and properly exercised its discretion to do so in this case.

a. In rejecting petitioner's challenge to the district court's remedial authority, the court of appeals relied on its holding in *SEC* v. *Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1103 (2d Cir. 1972), that "[o]nce the equity jurisdiction of the district court has been properly invoked by a showing of a securities law violation, the court possesses the necessary power to fashion an appropriate remedy." Pet. App. 4a. That holding, like the similar holdings of other courts of appeals,[10] is nothing more than an application of this Court's holding in *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), that "federal courts have the power to grant all necessary remedial relief" for violations of the Exchange Act, *Borak*, 377 U.S. at 435, and that "it is the duty of the

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[10] See, *e.g.*, *SEC* v. *Investors Sec. Corp.*, 560 F.2d 561, 567 (3d Cir. 1977); *SEC* v. *Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980).

courts to be alert to provide such remedies as are necessary to make effective the congressional purpose," *id.* at 433. See *Franklin* v. *Gwinnett County Pub. Schs.*, 112 S. Ct. 1028, 1034 (1992) (discussing *Borak* with approval).[11]

Although *Borak* and *Manor Nursing Ctrs.* each involved a remedy designed to provide relief to particular injured parties, it is well established that the courts may also utilize their equitable powers in a Commission enforcement action to protect the public generally by preventing defendants from continuing their unlawful conduct and from engaging in future misconduct. See, *e.g.*, *SEC* v. *Rind*, 991 F.2d 1486, 1490 (9th Cir.), cert. denied, 114 S. Ct. 439 (1993). The most common form of equitable deterrent is an injunction against future misconduct by the defendant. But where such an injunction alone would be inadequate to ensure compliance with the securities laws, the courts have not hesitated to use their authority to craft other equitable remedies. For example, the courts have ordered disgorgement of illegal profits to render violations unprofitable, and have imposed asset freezes to assure that ill-gotten gains are not dissipated.[12]

Where defendants have used their control of companies to the detriment of investors, the courts have removed the defendants from corporate control. That result has most commonly been accomplished through imposition of

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[11] See generally 1 J. Pomeroy, *Equity Jurisprudence* §§ 114-115, 181, 231, 236(a), 239(a) (5th ed. 1941) (courts of equity have power to shape full relief).

[12] See, *e.g.*, *SEC* v. *Bilzerian*, 29 F.3d 689, 696-697 (D.C. Cir. 1994); *SEC* v. *Rind*, 991 F.2d at 1490; *SEC* v. *Blavin*, 760 F.2d 706, 712-713 (6th Cir. 1985); *Manor Nursing Ctrs.*, 458 F.2d at 1103-1105.

a receivership.[13] But the courts have also, in appropriate cases, barred a corporate miscreant from serving as an officer or director of any publicly held company. Even before Congress's express endorsement of that remedy, the courts used their inherent remedial powers to impose officer/director bars in more than fifty cases. While most officer/director bars have been imposed pursuant to consent decrees (a result consistent with the fact that most cases brought by the Commission are settled), that remedy has also been imposed in litigated cases. [14]

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[13] See, *e.g.*, *Aldred Inv. Trust* v. *SEC*, 151 F.2d 254, 260-261 (1st Cir. 1945), cert. denied, 326 U.S. 795 (1946); *SEC* v. *American Bd. of Trade, Inc.*, 830 F.2d 431, 436 (2d Cir. 1987), cert. denied, 485 U.S. 938 (1988); *SEC* v. *Bowler*, 427 F.2d 190, 196-198 (4th Cir. 1970); *SEC* v. *First Fin. Group*, 645 F.2d 429, 436-438 (5th Cir. 1981); *SEC* v. *Keller Corp.*, 323 F.2d 397, 403 (7th Cir. 1963); *SEC* v. *Wencke*, 622 F.2d at 1369 & n.7.

[14] See *SEC* v. *Techni-Culture, Inc.*, SEC Lit. Rel. No. 7108 (D. Ariz. Oct. 1, 1975) (making permanent the preliminary officer/director bar entered in *SEC* v. *Techni-Culture, Inc.*, [1973-74 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,501 (D. Ariz. Apr. 2, 1974); *SEC* v. *American Beef Packers, Inc.*, [1977] Fed. Sec. L. Rep. (CCH) ¶ 96,079 (D. Neb. May 4, 1977) (recognizing power to impose total bar but imposing limited bar due to mitigating circumstances). Cf. *L.P. Steuart & Bro.* v. *Bowles*, 322 U.S. 398, 404-406 (1944) (approving suspension of gas distributor's access to rationed materials as remedy for distributor's violation of wartime rationing regulations; suspension was not penalty but rather deterrent to wrongdoing).

Petitioner erroneously asserts (Pet. 14) that "[u]pon the imposition of the director/officer bar in this case, the SEC took note that no court had ever extended its equitable power to allow the imposition of this harsh punishment." The Commission release that petitioner cites observed that "[t]he Court's barring the Posners from serving in such capacities [as officers or directors] represents the first time that a court has imposed that *statutory remedy* in a litigated action." SEC Lit. Rel. No. 13891, 1993 LEXIS 3214, at 3 (Dec. 2, 1993) (emphasis added). The release said

b. Petitioner appears to concede that the courts have "the necessary power to fashion an appropriate remedy" for securities law violations, Pet. 10, and to recognize that the district court could have removed him from control of those companies through which he effected the fraud at issue in this case, Pet. 11-12. He argues (Pet. 11-12), however, that the court lacked the power to go further and bar him from serving as an officer or director of other public companies as to which there had been no charge of fraud. Petitioner fails to recognize that, like other types of equitable relief, an officer/director bar serves a prophylactic purpose of preventing future misconduct. The courts need not restrict the scope of relief to those companies that have already been defrauded and stand idle while persons proven to have committed serious violations engage in yet more misconduct with respect to other public companies; they may and customarily do act to prevent likely harm before it occurs.[15] Thus, when a court enjoins a person (as courts enjoined petitioner twice

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nothing about prior instances in which the remedy has been imposed pursuant to the courts' inherent authority.

[15] Petitioner suggests (Pet. 11 n.5) that the court's fear that he would engage in further violations is "unfounded" because "there was no evidence that [petitioner] had violated the securities laws * * * between [the mid-1980s] and the end of the trial." That issue is fact-bound and does not merit further review. In any event, petitioner is incorrect. Petitioner's unlawful extraction of funds from Fischbach continued into 1990. See note 3, *supra*. And much of the serious misconduct on which the district court relied (*e.g.*, Sharon Steel) came to light after the filing of this action, with some of it (*e.g.*, DWG) occurring shortly before trial. See Pet. App. 40a-47a. Thus, while petitioner is correct that his history of violations goes back a long way (to 1972), the record shows that it continued through the time of his trial. Petitioner's two decades of abuse of public corporations amply justifies the officer/director bar and other relief imposed by the district court.

before) from committing future securities violations, the injunction is typically not limited to violations pertaining to those companies associated with the person's past violations, but instead applies broadly to all companies and securities thereof. That approach mirrors and is informed by the general approach of the securities laws, which in many contexts protect affected industries against known violators by imposing across-the-board bans. See, *e.g.*, Section 15(b)(6) of the Exchange Act, 15 U.S.C. 78*o*(b)(6) (barring violators from association with brokers or dealers); Section 203(f) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-3(f) (barring violators from association with investment advisers).

As with a receivership, a bar operates to prevent a defendant from using his or her corporate position to effect future fraud.[16] But removing petitioner from control of only those companies through which he committed the particular fraud at issue in this case would do nothing to prevent him from defrauding and otherwise harming investors at other publicly held companies under his control. The evidence showed that such fraud was likely. Petitioner had twice been enjoined against securities fraud in cases in which he had been accused of abusing his position at the helm of public companies. The courts below had before them an extraordinary record, which showed that petitioner had time after time taken control of public companies and, in disregard of the interests of the companies' public investors, grossly misused the companies for his

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[16] The National Commission on Fraudulent Financial Reporting, whose recommendations led to Congress's codification of the courts' officer/director bar authority (see S. Rep. No. 337, 101st Cong., 2d Sess. 4 (1990); H.R. Rep. No. 616, 101st Cong., 2d Sess. 14 (1990)), expressed the view that a receivership "amount[s] to a *de facto* partial bar." *Report of the National Commission on Fraudulent Financial Reporting* 66-67 (Oct. 1987).

personal benefit. Barring petitioner from control of all public companies was well within the court's equitable discretion to protect public investors generally.

c. Petitioner also errs in contending (Pet. 12-13) that the remedies ordered in this case are cumulative and therefore constitute punishment. Each type of relief ordered serves a distinct remedial purpose. Disgorgement removes from petitioner his ill-gotten gain, restores him to the position he would have been in but for the fraud, and, by making the fraud unprofitable, removes the incentive for future acts of fraud. The officer/director bar removes petitioner from corporate offices in publicly held companies, from which he could otherwise engage in future acts of fraud. And because petitioner has demonstrated that, even if he is not personally an officer or director, he can through his voting control put in place compliant officers and directors who will carry out his wishes,[17] imposition of a voting trust was necessary to assure that petitioner will not cause companies under his control to engage in fraudulent activities through use of his voting powers.

Petitioner argues (Pet. 13) that the voting trust would have been sufficient to prevent him from taking corporate office against the wishes of innocent minority shareholders, and contends (*ibid.*) that the officer/director bar therefore serves only to prevent shareholders from voluntarily choosing him as a corporate officer or director. Petitioner's argument assumes that those electing or appointing him know of

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[17] The district court noted that that was the case at DWG (Pet. App. 43a, quoting Special Committee's Report):

> Attending a DWG directors' meeting is like attending an old-fashioned camp meeting. Mr. Posner is the preacher and his relatives and other hand-picked directors respond "Amen" to his every statement, no matter how outlandish.

his past activities, a supposition that will be true only if petitioner makes full and accurate disclosure or if those who hire him have otherwise obtained the relevant facts. The district court did not have to pin the protection of public company shareholders on that speculative supposition. [18]

3. Petitioner asserts (Pet. 15) that to allow the federal courts to impose officer/director bars will displace state law of corporations "without a clear statement from Congress," and thereby violate core principles of federalism.

The objective of an officer/director bar, however, is not to direct the governance of corporations. The bar serves the federal government's interest in protecting investors against securities fraud. The legislative history of the Remedies Act addresses that concern:

> [T]hese corporate bar provisions are not intended to establish Federal standards governing the qualifications of corporate officers or directors. Rather, they are intended to protect public investors from persons who, by engaging in fraudulent conduct,

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[18] Petitioner also claims (Pet. 13 & n.7) that the district court erred in ordering him to disgorge the entire $3,490,550 he received in compensation from Fischbach. The courts below properly reasoned that petitioner would not have received any of that money had he not fraudulently secured control of Fischbach. Petitioner contends that the amounts to be disgorged should have been offset by the value of the services he performed for Fischbach and by the taxes he paid on the money. But, as the district court recognized, Pet. App. 60a, petitioner had the burden of distinguishing ill-gotten from earned compensation, and he presented no evidence on that issue in spite of an express invitation by the district court to do so. The sole evidence that petitioner now cites to support his argument that the amount of disgorgement was excessive (Pet. 11 n.4) is an affidavit filed for the first time with the court of appeals in support of petitioner's motion to stay the judgment.

> already have demonstrated that they should not be entrusted with authority over investor funds. * * * Moreover, broader public interests are involved when the actions of the violator undermine the integrity of the markets.

S. Rep. No. 337, 101st Cong., 2d Sess. 22 (1990); accord H.R. Rep. No. 616, 101st Cong., 2d Sess. 27 (1990). It is hardly surprising that where violations of federal antifraud law are committed through state-chartered institutions, the relief ordered may have an incidental impact on the governance of those corporations. But to the extent that such relief might touch on matters in which state law plays a role, the interplay does not render the relief an inappropriate displacement of state law. The federal courts are not precluded from ordering relief with respect to entities that also are subject to state law.[19] Petitioner's reliance on *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462 (1977), is unavailing. There the Court found no federal interest at stake. *Id.* at 479-480. Here the federal interest in preventing further securities violations is plain and justifies appropriate relief. Cf. *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1093 n.6 (1991).

4. Petitioner contends (Pet. 17) that the district court could not base its authority to impose the officer/director bar on its inherent powers, since to do so would "evade the command of" the Remedies Act. Peti-

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[19] From the standpoint of the company and its stockholders, a prohibition on the election or appointment of specific individuals is far less intrusive than a receivership. A receivership not only removes existing management but places the corporation under the control of the court and its appointed receiver. The bar imposed in this case, in contrast, removes petitioner from control of certain companies but otherwise leaves the control of those companies in the hands of the remaining shareholders, directors, and officers.

tioner did not raise that contention below. His sole argument below relating to the Remedies Act was that the Remedies Act was not itself a retroactive grant of authority. Petitioner never contended that the express grant of authority in the Remedies Act operated to deprive courts of their inherent power to order an officer/director bar. Petitioner is precluded from raising that issue for the first time before this Court. *E.g.*, *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 216 n.2 (1985).

In any event, petitioner's argument is incorrect. Petitioner asserts that the Remedies Act expressly states that the statutory authority it provides for imposition of officer/director bars applies only to post-Act conduct. To order a bar for pre-Act conduct under the court's inherent powers is, he says, "mere circumvention of the prospectivity provision of the Act." Pet. 20; see Pet. 18.

There is, however, no "prospectivity provision" in the Remedies Act that applies to officer/director bars. Petitioner's citation (Pet. 20) to Section 1(c) of the Remedies Act, 104 Stat. 931, in support of his prospectivity argument is based on a misreading of that provision. Section 1(c) provides that the "civil penalties" authorized under the Act may be imposed only for conduct occurring after the date of enactment, with the caveat that the proscription on retroactive civil penalties "shall not operate to preclude the Securities and Exchange Commission from ordering an accounting or disgorgement" in an administrative proceeding. Pub. L. No. 101-429, § 1(c), 104 Stat. 931-932. Petitioner reads Section 1(c) as establishing that accounting and disgorgement are civil penalties (which may be imposed retroactively), and suggests that, by implication, the officer/director bar must also be a civil penalty. Then, so the argument goes, because the officer/director bar is

not excepted by Section 1(c), it may not be imposed retroactively.

An officer/director bar is not a "penalty", however, but is instead a remedial device,[20] and Congress did not state or imply otherwise. Section 1(c) excepts accounting and disgorgement not because accounting and disgorgement are themselves civil penalties, but because, under 15 U.S.C. 78u-3(e) (Supp. II 1990), the Commission may order an accounting or disgorgement only in those administrative proceedings in which it "may impose a penalty." The express exception of accounting and disgorgement from Section 1(c) ensures that even though the Commission may not retroactively impose Remedies Act civil penalties, it may retroactively order accounting and disgorgement.[21]

But even if Congress did intend the statutory bar to apply only to post-Act conduct, the courts could presumably continue to use their inherent authority in cases involving pre-Act conduct.[22] Such inherent powers

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[20] Cf. *Associated Sec. Corp.* v. *SEC*, 283 F.2d 773, 775 (10th Cir. 1960) (bar from securities industry is remedial device to protect public); *Pierce* v. *SEC*, 239 F.2d 160, 163 (9th Cir. 1956) (denial of broker-dealer registration application is not a penalty); *Wright* v. *SEC*, 112 F.2d 89, 94 (2d Cir. 1940) (expulsion from securities industry is not a penalty); *L.P. Steuart & Bro.* v. *Bowles*, 322 U.S. at 406.

[21] If, as petitioner contends, Congress viewed accounting and disgorgement as "penalties," the provision in 15 U.S.C. 78u-3(e) restricting the availability of disgorgement and accounting to proceedings in which the Commission "may impose a penalty" would be superfluous.

[22] Nothing in the cases on which petitioner relies (Pet. 17-18) precludes a court from using its inherent powers in situations where a statute does *not* apply. Indeed, the principal case cited by petitioner expressly affirms that authority. See *Darby* v. *Cisneros*, 113 S. Ct. 2539, 2548 (1993) ("Of course, the exhaustion doctrine

would be displaced only if Congress so directed.[23] It did not. Congress was aware when it passed the Remedies Act that courts had invoked their inherent equitable powers to impose officer/director bars (see S. Rep. No. 337, *supra*, at 22-23; H.R. Rep. No. 616, *supra*, at 27 & n.9), and the legislative history of the Act demonstrates Congress's intention to "affirm" and "provide further notice" of the courts' power to order that relief. [24]

Far from seeking to remove the courts' inherent power, Congress specifically intended that the courts continue to exercise their inherent power in all cases in which the Act does not apply. The Senate Report stated: "By codifying this authority with respect to certain conduct, however, the Committee does not intend to limit the inherent authority of a court to order such relief when it is necessary or appropriate in other cases." S. Rep. No. 337, *supra*, at 22. And the House Report similarly stated: "The Committee does not intend * * * to limit the inherent authority of federal district courts

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continues to apply as a matter of judicial discretion in cases not governed by the APA.").

[23] "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986); accord *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979); 3 N. Singer, *Sutherland Statutory Construction* § 58.02 (5th ed. 1992) (collecting cases).

[24] The Senate Report states that "[t]he legislation expressly affirms the inherent authority of a court to bar [violators of the antifraud provisions] from serving as an officer or director of a publicly-held company," S. Rep. No. 337, *supra*, at 3-4, and "provides further notice of the availability of this remedy," *id.* at 22. See also H.R. Rep. No. 616, *supra*, at 27 ("The Committee believes that federal district courts already may order such relief pursuant to their inherent equitable powers.").

to order such relief when it is necessary or appropriate." H.R. Rep. No. 616, *supra*, at 27. Petitioner's contention (Pet. 20) that Congress "limit[ed] the power of the judiciary to order permanent director/officer bars" is directly contrary to Congress's intent on the matter.[25]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[25] Although a full retroactivity analysis is unnecessary here, since the court of appeals did not base its decision on the Remedies Act, petitioner's statutory argument is flawed at the outset because the legislative history demonstrates that Congress clearly intended the Act's officer/director bar provisions to apply in cases involving pre-Act conduct. It is not credible that Congress would codify and confirm what it believed to be existing law, but intend to leave a gap in which neither that preexisting law nor its new statutory counterpart would apply. This case presents a situation that is very different from that in *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483 (1994), and *Rivers* v. *Roadway Express, Inc.*, 114 S. Ct. 1510 (1994), where Congress was not seeking to preserve what it viewed as the status quo, but was instead adding new remedies or restoring judicially repudiated causes of action.